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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

No. 72-678

SHERMAN FORD, JR., d/b/a
Ford Records,

Petitioner,

-against-

FORD MOTOR COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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Respondent, Ford Motor Company, respectfully submits this brief in opposition to

the petition of Sherman Ford, Jr., seeking a writ of certiorari.

Statement of the Question Presented

Petitioner's statement of the question presented is misleading and inaccurate. A better statement of the question to this Court would be:

> Was the CCPA correct in applying the statute to the facts of the case and denying registration to petitioner on the grounds that respondent's prior trade name use of the same designation (FORD) on the same goods (phonograph records) was likely to cause confusion?

Statement of the Case

The petitioner's statement of the case incorrectly characterizes the decision below which, as printed in full in the petition as Appendix B speaks for itself. The statement of the case also dwells on insignificant and irrelevant facts, and a better statement

of the factual background involved can be obtained from the factual review of the decisions of the tribunals below which are reproduced in the petition as Appendices A and B, especially Appendix B.

Reasons for Denying the Writ

Petitioner seeks review on writ of certiorari of a judgment of the Court of Customs and Patent Appeals but has not indicated any "special and important reasons therefor"[1/] and in point of fact there are none. For this reason alone the petition should be denied.

The decision for which review is sought was a routine judgment in which the Court of Customs and Patent Appeals (CCPA) reversed

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1/ Rule 19 RULES OF THE SUPREME COURT

a decision of the Trademark Trial and Appeal Board (TTAB), an administrative board within the Patent Office, over which the CCPA has statutory appellate jurisdiction.[2/]

The petitioner does not rely on any of the reasons specified in Rule 19(1)(b), of this Court but requests this Court to resolve a "dispute" between the CCPA and the TTAB.[3/] This "dispute" arises from the simple fact that the CCPA reversed the TTAB, over which it has appellate jurisdiction on the record. This is simply a case of an appellate court reversing a lower court or administrative

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2/ 15 U. S. C. §1071

3/ The general considerations of Rule 19(1) are applicable to certiorari petitions to review CCPA cases. Rule 19(2) RULES OF THE SUPREME COURT.

agency over which it has appellate jurisdiction. This is no more of a dispute than any other reversal of the TTAB by the CCPA, and nothing has been presented to show that it was anything more than routine. The CCPA decision turned solely on an analysis of the facts involved. This Court does not and should not grant certiorari to "review evidence and discuss specific facts". U. S. v. Johnston 268 U. S. 220, 227 (1925).

As authority for granting the writ petitioner places mistaken reliance upon Brenner v. Manson 383 U. S. 519, 522, 527 (1966) wherein certiorari was granted "... to resolve this running dispute over what constitutes 'utility' in chemical process claims, as well as to answer the question concerning our certiorari jurisdiction" 383

U. S. at 522. However, as this Court's footnote at that point notes "In addition to the clear conflict between the Patent Office and the CCPA, there arguably exists one between the CCPA and the Court of Appeals for the District of Columbia" (citations omitted). Thus, Brenner v. Manson presented "two questions of importance to the administration of the patent laws." (emphasis added) 383 U. S. at 520, as well as a conflict between two courts of appeal. This case involves no important issues or questions as concerns administration of the trademark registration law, and no conflict between appellate courts. 4/ Importance of the issues

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4/ The TTAB is not even a court much less a court of appeals, 15 U.S.C. §1067. The function of the TTAB in the proceedings below was to make an administrative determination of trademark registrability after an interparties proceeding under the statute. The TTAB did not even exercise its appellate function in the proceedings below.

involved is of major significance in determining whether the writ of certiorari will issue. 5 /

This case involves simply the right of petitioner to register FORD as a trademark for phonograph records. Respondent opposed registration based, inter alia, on prior use of its trade name FORD on phonograph records. The CCPA merely applied the statute which states that a mark shall be refused registration if it "Consists of ... a mark which so resembles a ... trade name previously used in the U. S. by another and not abandoned, as to be likely when applied to the goods of the applicant, to cause confusion ... " 15 U.S.C. §1502(d).

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5 / STERN & GRESSMAN, SUPREME COURT PRACTICE §4.11, page 167 (Bur. Natl. Affairs, 1969); Rule 19.

Quite obviously the mark FORD for phonograph records so resembles respondent's trade name FORD previously used on phonograph records that confusion was likely. Here the issues are important only to the particular parties involved as distinguished from the public and hence are not "important" as interpreted by this Court as a requisite for the grant of a writ of certiorari. Rice v. Sioux City Cemetary, 349 U. S. 70, 79 (1955).

Petitioner's own statement of the "QUESTION PRESENTED" clearly shows that this is not a case involving principles, the settlement of which is "of importance to the public as distinguished from that of the parties" Layne & Bowler Corp. v. Western Well Works Inc., 261 U. S. 387, 393 (1923). The first and second parts of the petitioner's "question

presented" are answered by the statute relied upon which does not require prior registration or prior trademark use to refuse registration but specifies prior trade name use in the U. S. as a grounds for such refusal, 6 / a fact clearly present here. The third part of the question is irrelevant as pointed out by the CCPA decision, since petitioner's application to register FORD for phonograph records is not limited to "either the content or method of distribution and sale" 7 / so as to exclude respondent's previously used FORD training phonograph records.

This case does not involve a question

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6 / 15 U. S. C. §1502(d).

7 / CCPA decision, page 5, Appendix B to the petition.

of importance which is in the public interest to be decided by this Court of last resort. This Court does not and should not grant writs merely to give the defeated party in the court below another hearing. Magnum Co. v. Coty 262 U. S. 159, 163 (1923), Ferguson v. Moore-McCormack Lines Inc. 352 U. S. 521, 531 (1957), dissent of Frankfurter, J.

In short summary, there is nothing special or important about the CCPA decision and this Court in the exercise of sound judicial discretion should deny the petition for writ of certiorari.

Respectfully submitted,

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